1995

State of Utah v. Gordon Ray Ham : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	: DOCKET NO.	950062 CA
Plaintiff/Appellee,	: Case No.	950062-CA
v.	:	
GORDON RAY HAM,	: Priority No.	2
Defendant/Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM A CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE § 58-37-8(1)(a)(iv) (1994), IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE DAVID S. YOUNG PRESIDING.

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ORAL ARGUMENT REQUESTED

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STATE OF UTAH,	:	
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Defendant/Appellant.	:	

BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

Defendant Gordon Ray Ham appeals his conviction for possession of a controlled substance (cocaine) with intent to distribute pursuant to Utah Code Ann. § 58-37-8(1)(a)(iv) (1994) (R. 81), a second degree felony pursuant to Utah Code Ann. §§ 58-37-4(2)(b)(i)(D)(1994) and 58-37-8(1)(b)(i)(1994). This Court has jurisdiction pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1995).

STATEMENT OF THE ISSUES AND STANDARDS OF APPELLATE REVIEW

1. Did the trial court correctly conclude that defendant voluntarily consented to the probation officers' initial search for alcohol? In State v. Thurman, 846 P.2d 1256 (Utah 1993), the Supreme Court held that a trial court's ultimate conclusion that a consent to search was voluntary constitutes a question of law

reviewed for correctness. Id. at 1271. However, the appellate courts should accord the determination some deference. State v. Pena, 869 P.2d 932, 938-41 (Utah 1994).

2. Where the probation officers stated they intended to look for alcohol in the refrigerator and defendant did not object to them looking in the freezer next to the refrigerator, did the trial court properly conclude that defendant's consent to look for alcohol in the refrigerator implicitly included consent to look for alcohol in the freezer? Whether a consent search exceeds the scope of the consent is a question of fact reviewed for clear error only. State v. Grovier, 808 P.2d 133, 137 (Utah App. 1991).

3. If the initial search was illegal, did defendant nevertheless voluntarily consent to the subsequent search that led to the cocaine on which his conviction was based? The trial court did not deny the motion to suppress on this basis; therefore, there is no trial court finding to review. However, this Court may affirm the trial court's ruling on any proper basis. State v. Gray, 717 P.2d 1313, 1316 (Utah 1986).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

Addendum A contains the text of the relevant constitutional provisions, statutes, and rules.

STATEMENT OF THE CASE

The State charged defendant with possession of cocaine with intent to distribute in violation of Utah Code Ann. § 58-37-8(1)(a)(iv) (1994), a second degree felony pursuant to Utah Code Ann. §§ 58-37-4(2)(b)(i)(D)(1994) and 58-37-8(1)(b)(i)(1994), and with possession of psilocybin mushrooms in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1994), a third degree felony pursuant to Utah Code Ann. §§ 58-37-4(2)(a)(iii)(T) (1994) and 58-37-8(2)(b)(ii) (1994)(R. 7-8). After the trial court denied defendant's motion to suppress evidence, defendant conditionally pleaded guilty to possession of cocaine with intent to distribute and the court, on the State's motion, dismissed the possession charge (R. 67-68, 75).

On January 23, 1995, the trial court sentenced defendant to the statutory prison term of one to fifteen years and imposed a $4,625 fine (R. 81).

STATEMENT OF FACTS

On October 13, 1994, probation officers Scott McCullough and Craig Hillam visited defendant, a probationer, on a routine home visit to assure defendant's compliance with his probation conditions (R. 37, 86, 119, 156). Defendant's probation

agreement proscribed him from possessing alcohol and from illegally using or distributing controlled substances (R. 37).

At defendant's home, a woman answered the door and told the probation officers defendant was in the basement (R. 121). The probation officers waited either on the porch or just inside the front door for defendant to come upstairs (R. 141).

When defendant came upstairs, McCullough asked whether defendant was having any problems (R. 123). McCullough then "stated words to the effect 'We need to look in the refrigerator for alcohol'" (R. 86), or "We need to look in the fridge for alcohol, okay?" (R. 142), or that he wanted to make an alcohol check, is that okay? (R. 169). "[D]efendant replied words to the effect 'Go ahead' (in any event the defendant did not state any objection)" (R. 86).

The probation officers then went into the kitchen. McCullough checked in the refrigerator and found no alcohol (R. 86, 125, 158). Hillam looked in the freezer, located one step away from the refrigerator, where he found two bottles of alcohol (R. 86, 125, 158-59). Defendant did not object to Hillam looking in the freezer (R. 56). McCullough poured the confiscated alcohol down the drain and told defendant that possessing the alcohol violated his probation (R. 125-26).

The probation officers then instructed defendant to escort them on a cursory search through the house (R. 86, 126). Defendant did not object and led the probation officers through the house, opening doors and explaining what each room was (R. 126, 146). During this walk-through, the probation officers "did not take any time to look through stuff in the upstairs" (R. 146).

Defendant led the probation officers into the basement, where they found fourteen cans of beer in a cooler (R. 86, 127, 161). While McCullough spoke to defendant about the additional beer, Hillam checked in a back room in the basement, where he found in plain view a framed mirror with a white substance on it, razor blades, and devices that could be used for "snorting coke" (R. 86, 161-62). There was enough residue on the mirror to provide two "snorts" (R. 163).

When Hillam returned from the room, he arrested and handcuffed defendant (R. 86, 128, 163). Hillam asked defendant about additional drugs (R. 86). Defendant told the probation officers he had psilocybin mushrooms in the house, confirmed that the white powder on the mirror was cocaine, and admitted that the cocaine belonged to him (R. 86-87, 128, 163-64).

While waiting for back-up police officers to arrive, Hillam gave defendant his Miranda warnings, asked defendant whether there were anymore drugs in the house, and told him they would search the house anyway (R. 129). Defendant told the probation officers about a trunk in a closet under the stairs and gave the closet key to the probation officers (R. 87, 129-30, 148-49). The probation officers found the largest quantity of cocaine in that trunk (R. 130).

Defendant moved to suppress all of the evidence seized, including the cocaine found under the stairs (R. 19-20). The trial judge denied the motion (R. 58, 87-88), finding: (1) defendant consented to the officers' initial search of the refrigerator; (2) defendant's consent implicitly included searching the freezer next to the refrigerator; and (3) discovering the alcohol in the freezer gave the officers sufficient reasonable suspicion to conduct a more intrusive search of defendant's home (R. 87). The Findings of Fact and Conclusions of Law are attached as addendum B.

SUMMARY OF THE ARGUMENT

1. Voluntariness of consent. Under the totality of the circumstances of this case, defendant voluntarily consented to the initial search of the refrigerator and freezer, which

resulted in the seizure of the alcohol. Defendant gave the consent while in his own home and before he was in custody. The officers waited at defendant's front door until someone answered it, waited either on the porch or just inside the front door for defendant to come up from the basement, and made no show of force. Although defendant disputed that he actually consented, both officers testified that he responded affirmatively to their search request. In light of these circumstances, the trial court correctly concluded that defendant voluntarily consented to the search.

2. Scope of consent. The trial court correctly concluded that defendant's consent to search the refrigerator for alcohol included searching the nearby freezer. Although a separate appliance, the officers informed defendant that alcohol was the object of the search and both appliances could be used to chill alcohol. Furthermore, defendant did not object when Hillam opened the freezer door to look inside.

3. Attenuation of second consent. Alternatively, if some deficiency exists in the initial consent, defendant's second consent to search the closet under the stairs supports the trial court's refusal to suppress the cocaine found in the closet. Defendant voluntarily consented to searching the closet by

informing Hillam that there was cocaine in the closet then giving Hillam the keys to the closet. The second consent was also sufficiently attenuated from any prior illegality. Although close in time and circumstance, no flagrant constitutional violation preceded the second consent. To the contrary, the probation officers believed they had satisfied all constitutional requirements to conduct the initial search; therefore, suppressing the evidence would provide little deterrence benefit while robbing the State of critical evidence.

ARGUMENT

INTRODUCTION

A probationer has a diminished privacy interest under the Fourth Amendment to the United States Constitution. Therefore, the probation officers could constitutionally search defendant's residence once they had reasonable suspicion to believe that he had violated his probation or that he had committed some other offense. State v. Velasquez, 672 P.2d 1254, 1260 (Utah 1983), State v. Martinez, 811 P.2d 205, 209-10 (Utah App. 1991).

Defendant correctly argues that the State cannot rely on reasonable suspicion of a probation violation to justify the search of defendant's freezer. Appellant's Brief at 11-14. Both probation officers testified they did not suspect that defendant

had violated any probation condition until they discovered alcohol in his freezer, and that they based their search of the refrigerator and the freezer on defendant's consent (R. 119, 122-25, 157-58). The trial court's finding is consistent with this testimony (R. 87).

On the other hand, once the probation officers found the alcohol in defendant's freezer, they had sufficient reasonable suspicion to justify the more extensive search that ultimately led to the cocaine, psilocybin mushrooms, and drug paraphernalia. Defendant does not dispute this point, arguing only the constitutional infirmity of the freezer search. Therefore, the trial court properly refused to suppress the cocaine if defendant gave the probation officers a constitutionally effective consent to search the freezer or if defendant's subsequent consent to search under the stairs cured any defect in the initial consent.

POINT I

THE RECORD SUPPORTS THE TRIAL COURT'S CONCLUSION THAT DEFENDANT VOLUNTARILY CONSENTED TO THE SEARCH OF HIS REFRIGERATOR AND FREEZER

The trial court concluded that defendant consented to the probation officers searching his refrigerator and, by implication, his freezer (R. 87). On appeal, defendant argues that the record fails to establish a clear and unequivocal

consent.[1] However, defendant's argument ignores most of the circumstances and testimony supporting the trial court's conclusion. In light of the totality of the circumstances, the trial court correctly concluded that defendant voluntarily consented to the initial search for alcohol.

A. Standard of review.

In State v. Thurman, 846 P.2d 1256 (Utah 1993), the Utah Supreme Court held that the trial court's ultimate voluntariness conclusion constitutes a question of law reviewed for correctness. Id. at 1271. However, in Thurman, the court considered only two possibilities: whether the determination constituted a question of fact reviewed for clear error or a question of law reviewed for correctness. Id. at 1268-69.

Since Thurman, the supreme court has de-polarized its articulation of the standards for reviewing how a trial court

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[1]Although the trial court did not make a specific finding on voluntariness (R. 85-88), it did find that defendant consented to the initial search and denied his motion to suppress (R. 87). The lack of a specific voluntariness finding may be explained by defendant's failure to frame his argument as specifically challenging the voluntariness. Instead, defendant claimed that he did not clearly and unequivocally consent to the search (R. 21-27). The trial court's rejection of this argument amounts to a finding that defendant voluntarily consented to the search because defendant's claim implicates the voluntariness analysis. See, e.g., State v. Carter, 812 P.2d 460, 467 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992).

applies a legal principle to the facts a specific case. In State v. Pena, 869 P.2d 932 (Utah 1994), the court recognized that appellate courts should often give trial courts some discretion when applying a rule of law to the facts before it. Id. at 936-37. The court described the degrees of discretion as a spectrum: at one end, trial court's have broad discretion in applying the rule to the facts, and at the other, only narrow discretion. Id. at 938. Although the court cited to Thurman as an example of the kinds of issues at the narrow end, it also granted trial courts a "measure of discretion" in determining whether reasonable suspicion justifies a warrantless search and whether a defendant voluntarily waived his Miranda rights because both determinations depend heavily on the particular facts before the trial court. Id. at 938-41.

Because a determination of voluntary consent to a search also depends heavily on the unique facts of each case, the appellate courts should give trial courts "a measure of discretion" in making that determination. Cf. id.[2] In any event, the trial court's determination that defendant voluntarily

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[2]Pena identifies fact sensitivity of a particular issue as generally requiring giving trial court's at least some discretion in applying legal principles to the facts before them. Id. at 939.

consented withstands appellate scrutiny even under the stricter correctness standard.

B. The trial court correctly concluded that defendant voluntarily consented to the initial search.

Whether defendant voluntarily consented "is a fact sensitive issue to be determined by examining the totality of the circumstances." State v. Carter, 812 P.2d 460, 467 (Utah App. 1991), cert. denied, 836 P.2d 1383 (Utah 1992). The State meets its burden to establish voluntariness if it satisfies the following standard:

> "(1) There must be clear and positive testimony that the consent was "unequivocal and specific" and "freely and intelligently given"; (2) the government must prove consent was given without duress or coercion, express or implied; and (3) the courts indulge every reasonable presumption against the waiver of fundamental constitutional rights and there must be convincing evidence that such rights were waived."

Id. (citations omitted). The following factors provide guidance in determining whether the probation officers coerced the consent: "'1) absence of a claim of authority to search by the officers; 2) the absence of an exhibition of force by the officers; 3) a mere request to search; 4) cooperation by the owner...; and 5) the absence of deception or trick on the part of the officer.'" Id. at 467-68 (quoting State v. Whittenback, 621 P.2d 103, 106 (Utah 1980)).

The Utah Supreme Court and this Court have found that other defendants voluntarily consented under circumstances that suggest at least some coerciveness. For example, both courts have upheld the voluntariness of consents to search even though the suspect was under arrest and in custody. See, e.g., State v. Dunn, 850 P.2d 1201, 1217-19 (Utah 1993); State v. Bobo, 803 P.2d 1268, 1273-74 (Utah App. 1990). In State v. Dunn, the supreme court found the defendant's consent to search his duffle bag voluntary even though defendant based his consent on his need for medication in the bag. Similarly, in State v. Webb, 790 P.2d 65, 82-83(Utah App. 1990), this Court found that Webb's girlfriend voluntarily consented to the search even though officers initially arrived at the home with weapons drawn, she had her infant son in the home with her, she was handcuffed and initially made to kneel on the living room floor, and she was under arrest. Id. at 82-83. See also State v. Thurman, 846 P.2d 1256, 1273 (Utah 1993) (Thurman's second consent voluntary even though he had been in custody and shackled for six hours prior to giving it).

The overall circumstances under which defendant gave his consent were far less coercive than those in the cases described above. The probation officers went to defendant's home for one

of many routine probation checks, waited for someone to answer the door, asked for defendant, and waited either on the porch or just inside the front door for defendant to come upstairs rather than go looking for defendant (R. 121, 141, 144). Defendant cooperated fully with the probation officers and did not object or even hesitate when he agreed to let the probation officers check for alcohol (R. 124). Defendant was in the relative comfort of his own home and was not under arrest or physically restrained. The probation officers did not represent that they had a warrant to search, did not show any force, and did not attempt to deceive defendant. Based on this record, the trial court correctly concluded that defendant voluntarily consented to the alcohol check.

Defendant argues that because McCullough could not recall defendant's specific response to his request to check for alcohol, the State has not established an unequivocal and specific consent. Appellant's Brief at 15-17. Defendant ignores the trial court's factual finding that defendant responded to the search request, "Go ahead," or words to that effect (R. 86), and this record establishes that the trial court did not clearly err in making that finding. State v. Thurman, 846 P.2d at 1271 (underlying factual determinations reviewed for clear error).

Although neither officer could remember verbatim defendant's response, McCullough testified that he believed defendant said "go ahead" (R. 123), and Hillam testified that defendant responded affirmatively to the search request (R. 158). Responding to a search request with "go ahead" or any similar phrase establishes a clear and unequivocal consent. Defendant cites no case authority to the contrary.

Defendant also claims that he did not consent at all; rather, the probation officers told him that they would search and he merely failed to resist.[3] Appellant's Brief at 16-21. Whether defendant actually consented constitutes a question of fact reviewed for clear error. State v. Delaney, 869 P.2d 4, 8 (Utah 1994). At the suppression hearing, defendant testified that he never gave the probation officers permission to search (R. 173-74). By contrast, McCullough testified that he asked defendant, "We need to look in the fridge for alcohol, okay?" (R. 142), and Hillam testified that McCullough said that he wanted to make an alcohol check, is that okay? (R. 169). Both testified that defendant responded affirmatively. The trial court was

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[3]Defendant also makes this assertion in support of his argument that suppression provides the only appropriate remedy in this case. Id. The State has not asked for any substitute remedy.

entitled to and apparently did discredit defendant's testimony, finding that he actually gave his consent to the search. Id. ("'it is the prerogative of the trial court to evaluate the evidence and choose what testimony to believe'")(citation omitted). Defendant has not established any clear error in the trial court's finding. Id.

Based on the above, the trial court correctly concluded that defendant voluntarily consented to the initial search.

POINT II

THE TRIAL COURT PROPERLY CONCLUDED THAT THE SCOPE OF THE CONSENT TO SEARCH THE REFRIGERATOR INCLUDED LOOKING IN THE FREEZER

The trial court found that defendant's consent to search the refrigerator for alcohol implicitly included consent to search the freezer (R. 87). Although a separate appliance from the refrigerator, the freezer was located in the same room only "one step away" from the refrigerator (R. 125). Defendant challenges this finding.

Whether a search remains within the scope of the consent given is a factual question reviewed for clear error only. State v. Grovier, 808 P.2d 133, 137 (Utah App. 1991). See also, United States v. Martel-Martines, 988 F.2d 855, 858 (8th Cir. 1993); United States v. Pena, 920 F.2d 1509, 1514 (10th Cir. 1990),

cert. denied, 501 U.S. 1207 (1991).[4] "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness -- what would the typical reasonable person have understood by the exchange between the officer and the suspect." Florida v. Jimeno, 500 U.S. 248, 251 (1991); State v. Castner, 825 P.2d 699, 705 (Utah App. 1992). The object of the search generally defines its scope. Jimeno at 251.

In Jimeno, the United States Supreme Court held that consent to search an automobile included consent to search containers in the automobile that might contain narcotics because the officer identified narcotics as the object of the search. The Court held that "[a] reasonable person may be expected to know that narcotics are generally carried in some form of a container." Id.

In this case, a reasonable person would conclude that the consent to search the refrigerator included consent to search the freezer. Although separate appliances, they were next to each

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[4]This Court decided Grovier before the supreme court decided Thurman and Pena, and no subsequent cases from either this Court or the Utah Supreme Court have stated a different standard of review. However, even applying a less deferential standard of review, the Court should still affirm the trial court's finding that the search remained within the scope of defendant's consent.

other in the kitchen. McCullough informed defendant that the object of his search was alcohol; a reasonable person would know that both the refrigerator and the freezer could be used to chill alcohol.[5] A reasonable person would also expect a consent to search a refrigerator to include consent to search the refrigerator's freezer unit. That the freezer was a separate appliance in this case should not lead to a contrary result.

Moreover, defendant did not object when Hillam walked over to the freezer and opened it (R. 56). This also supports the trial court's finding that defendant understood his consent to include the freezer. See, e.g., United States v. Martel-Martines, 988 F.2d 855, 858 (8th Cir. 1993) (consent to search vehicle included consent to punch hole in sheet metal where defendant observed police preparing to do so and did not object); United States v. Dewitt, 946 F.2d 1497, 1501 (10th Cir. 1991) (consent to search glove box, trunk, and remainder of vehicle included cleft between the rear seat cushions because defendant acquiesced to searching their), cert. denied, 502 U.S. 1118 (1992); United States v. Pena, 920 F.2d 1509, 1514-15 (10th Cir.

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[5]The freezer was not cold enough to freeze the alcohol: the officers poured the alcohol down the drain even though defendant claimed the alcohol had been in the freezer for some time (R. 159).

1990) (consent to look inside the vehicle included looking under an outside vent in the rear quarter panel where defendant walked away from the vehicle and expressed no objection when the officer was examining the rear quarter panel), cert. denied, 501 U.S. 1207 (1991).

Based on these facts, the trial court correctly concluded that defendant's consent extended to the freezer.

POINT III

ALTERNATIVELY, DEFENDANT'S SUBSEQUENT VOLUNTARY CONSENT TO SEARCH UNDER THE STAIRS FOR COCAINE PROVIDES AN INDEPENDENT BASIS TO AFFIRM HIS CONVICTION

In the alternative, even if this Court concludes that some problem exists with defendant's consent to the initial search of his refrigerator and freezer, defendant subsequently consented to the search of the closet under the stairs that led to the cocaine on which his conviction is based. Because that consent was voluntary and sufficiently attenuated from any prior illegality, it provides an independent basis to admit the cocaine.

After arresting defendant and advising him of his Miranda rights, Hillam asked him about other drugs in the house (R. 129). In response, defendant informed the probation officers about the cocaine in the closet under the stairs and gave them the key to

the closet (R. 129-30, 148-49). The probation officers found the largest quantity of cocaine in that closet.

In order to remove the taint of any prior illegality, the second consent must be: (1) voluntary; and (2) sufficiently attenuated from the prior illegality so that excluding the evidence would have no deterrent effect. State v. Thurman, 846 P.2d 1256, 1265 (Utah 1993). The voluntariness analysis is the same regardless of any prior illegality. Id. at 1262. Defendant voluntarily consented to searching the closet under the stairs. When asked about additional drugs, defendant told the probation officers about the cocaine in the closet and gave them the keys to the closet. Although defendant was under arrest and handcuffed, that alone does not render his consent involuntary. State v. Webb, 790 P.2d 65, 82 (Utah App. 1990); State v. Bobo, 803 P.2d 1268, 1273-74 (Utah App. 1990). Defendant was still in the relative comfort of his own home, seated on a bed in the basement. Bobo, 803 P.2d at 1274. There is no evidence the probation officers threatened defendant's well-being. Webb, 790 P.2d at 82. Defendant did not hesitate to inform the probation officers about the cocaine under the stairs or to give them the key to the closet where he had hidden it. Cf. State v. Thurman, 846 P.2d at 1273 (Thurman voluntarily consented to the subsequent

search where he opened the combination lock to the storage unit searched). Finally, the probation officers had, by this time, given defendant his Miranda warnings and consequently informed defendant that he did not have to speak to them or, implicitly, cooperate with them. Cf. State v. Thurman, 846 P.2d at 1273 (Thurman given a second Miranda warning before consenting to search of storage unit).

Moreover, the subsequent consent to search the closet was sufficiently attenuated from the prior searches that any illegality in those searches did not taint the subsequent consent. Determining at what point sufficient attenuation exists requires balancing the need for deterring police misconduct against the cost to society of excluding relevant evidence. State v. Thurman, 846 P.2d at 1272. In turn, this requires "balancing the relative egregiousness of the misconduct against the time and circumstances that intervene before consent is given. The nature and degree of the illegality will usually be inversely related to the effectiveness of time and intervening events to dissipate the presumed taint. Where misconduct is extreme, [the courts] require a clean break in the chain of events . . . ." Id. at 1264.

Although close in time and circumstance, the subsequent search of the basement closet was nevertheless sufficiently attenuated from the prior searches to remove any taint. As argued in Point I, the probation officers conducted the initial searches only after they believed they had obtained defendant's consent to do so. Any initial illegality was not flagrant or intentional; to the contrary, the probation officers believed they had complied with what the Fourth Amendment required of them before they could legally search. Compare State v. Thurman, 846 P.2d at 1273 (officers intentionally entered Thurman's home illegally in a way "calculated to cause at least surprise, if not confusion and fright") (citations omitted). Therefore, no clean break between any initial illegality and the second consent is required. Similarly, suppressing the evidence would do little to deter future police misconduct.

Based on the above, the minimal, if any, benefit of suppressing the cocaine does not justify the cost to society of depriving the fact finder of relevant evidence. Therefore, defendant's voluntary, second consent supports the trial court's decision not to suppress the cocaine seized.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's conviction.

ORAL ARGUMENT REQUESTED

The State requests oral argument in this case because the issues depend heavily on the facts and implicate many possible analytical approaches.

RESPECTFULLY SUBMITTED this 7th day of Sept., 1995.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE was mailed by first-class mail, postage pre-paid, to the following on this 7th day of Sept., 1995:

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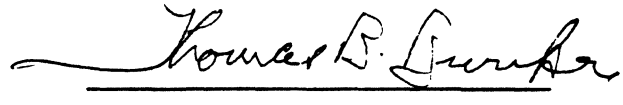

ADDENDA

ADDENDUM A

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3) (b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2-2, enacted by L. 1986, ch. 47, § 41; 1987, ch. 161, § 303; 1988, ch. 248, § 5; 1989, ch. 67, § 1; 1992, ch. 127, § 11; 1994, ch. 191, § 2; 1995, ch. 267, § 5; 1995, ch. 299, § 46.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, in Subsection (4), deleted former Subsections (e) and (f), which read: "general water adjudication" and "taxation and revenue; and," respectively, making related changes; redesignated former Subsection (g) as Subsection (e); and made stylistic changes in Subsection (e).

The 1994 amendment, effective May 2, 1994, added Subsections (3)(k) and (4)(e), making related changes.

The 1995 amendments by ch. 267 and ch. 299, both effective May 1, 1995, made the same changes: they changed "Board of State Lands and Forestry" to "School and Institutional Trust Lands Board of Trustees" in Subsection (3)(e)(iii) and added Subsection (3)(e)(vi).

NOTES TO DECISIONS

Analysis

Appellate jurisdiction.
—Attachment.
—Formal adjudicative proceedings.
Certiorari.
Original jurisdiction.
—Extraordinary writs.
Cited.

Appellate jurisdiction.

—Attachment.

Although this section did not govern a land conveyance because it was not in effect when petitioner filed its writ of review, this section did not divest the Supreme Court of jurisdiction, because jurisdiction attached under the statute in effect when the petition for review was filed. National Parks & Conservation Ass'n v. Board of State Lands, 869 P.2d 909 (Utah 1993).

—Formal adjudicative proceedings.

Subdivision (3)(e)(iii) confers jurisdiction in the Supreme Court only over final orders and decrees that originate in formal adjudicative proceedings in agency actions. Southern Utah Wilderness Alliance v. Board of State Lands & Forestry, 830 P.2d 233 (Utah 1992).

Certiorari.

When exercising certiorari jurisdiction granted by this section, the Supreme Court reviews the decision of the Court of Appeals, not of the trial court; therefore, the briefs of the parties should address the decision of the Court of Appeals, not the decision of the trial court. Butterfield v. Okubo, 831 P.2d 97 (Utah 1992).

Original jurisdiction.

—Extraordinary writs.

The term "original" in Subsection (2) adds nothing to the Supreme Court's writ jurisdiction — and its absence in § 78-2a-3(1) takes nothing from the jurisdiction of the Court of Appeals — because jurisdiction over petitions for extraordinary writs necessarily invokes a court's jurisdiction to consider a petition originally filed with it as opposed to its appellate jurisdiction over cases that originated elsewhere. Barnard v. Murphy, 882 P.2d 679 (Utah Ct. App. 1994).

Cited in State v. Humphrey, 823 P.2d 464 (Utah 1991).

CHAPTER 2a
COURT OF APPEALS

Section
78-2a-3. Court of Appeals jurisdiction.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

(a) to carry into effect its judgments, orders, and decrees; or

(b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Sovereign Lands and Forestry actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;

(b) appeals from the district court review of:

(i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and

(ii) a challenge to agency action under Section 63-46a-12.1;

(c) appeals from the juvenile courts;

(d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from a court of record in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from the orders on petitions for extraordinary writs challenging the decisions of the Board of Pardons and Parole except in cases involving a first degree or capital felony;

(i) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(j) appeals from the Utah Military Court; and

(k) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

History: C. 1953, 78-2a-3, enacted by L. 1986, ch. 47, § 46; 1987, ch. 161, § 304; 1988, ch. 73, § 1; 1988, ch. 210, § 141; 1988, ch. 248, § 8; 1990, ch. 80, § 5; 1990, ch. 224, § 2; 1991, ch. 263, § 22; 1992, ch. 127, § 12; 1994, ch. 13, § 45; 1995, ch. 299, § 47.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, added Subsection (2)(h) and redesignated former Subsections (2)(h) through (j) as Subsections (2)(i) through (k).

The 1994 amendment, effective May 2, 1994, substituted "Board of Pardons and Parole" for "Board of Pardons" in Subsection (2)(h) and inserted "Administrative Procedures Act" in Subsection (4).

The 1995 amendment, effective May 1, 1995, substituted "School and Institutional Trust Lands Board of Trustees, Division of Sovereign Lands and Forestry actions reviewed by the executive director of the Department of Natural Resources" for "Board of State Lands" in Subsection (2)(a).

existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation; as used in this Subsection (iii) only, "isomer" includes the optical, position, and geometric isomers:

(A) 4-bromo-2,5-dimethoxy-amphetamine;
(B) 2,5-dimethoxyamphetamine;
(C) 3,4-methylenedioxy amphetamine;
(D) 3,4-methylenedioxy methamphetamine (MDMA);
(E) 5-methoxy-3,4-methylenedioxy amphetamine;
(F) 4-methoxyamphetamine;
(G) 3,4,5-trimethoxy amphetamine;
(H) Bufotenine;
(I) Diethyltryptamine;
(J) Dimethyltryptamine;
(K) 4-methyl-2,5-dimethoxy-amphetamine;
(L) Ibogaine;
(M) Lysergic acid diethylamide;
(N) Marijuana;
(O) Mescaline;
(P) Parahexyl;
(Q) Peyote;
(R) N-ethyl-3-piperidyl benzilate;
(S) N-methyl-3-piperidyl benzilate;
(T) Psilocybin;
(U) Psilocyn;
(V) Tetrahydrocannabinols;
(W) Ethylamine analog of phencyclidine;
(X) Pyrrolidine analog of phencyclidine;
(Y) 1-1-(2-Thieny) Cyclohexyl Pyrrolidine; and
(Z) Thiophene analog of phencyclidine.

(iv) Unless specifically excepted or unless listed in another schedule, any material compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(A) Mecloqualone; and
(B) Methaqualone.

(v) Any material, compound, mixture, or preparation containing any quantity of the following substances having a stimulant effect on the central nervous system, including their salts, isomers, and salts of isomers:

(A) Fenethylline;
(B) 4-Methylaminorex; and
(C) N-ethylamphetamine.

(b) Schedule II:

(i) Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine,

dextrorphan, nalbuphine, naloxone, and naltrexone, and their respective salts, but including:

(I) Raw opium;
(II) Opium extracts;
(III) Opium fluid extracts;
(IV) Powdered opium;
(V) Granulated opium;
(VI) Tincture of opium;
(VII) Codeine;
(VIII) Ethylmorphine;
(IX) Etorphine hydrochloride;
(X) Hydrocodone;
(XI) Hydromorphone;
(XII) Metopon;
(XIII) Morphine;
(XIV) Oxycodone;
(XV) Oxymorphone; and
(XVI) Thebaine;

(B) Any salt, compound, derivative, or preparation which is chemically equivalent or identical with any of the substances referred to in Subsection (2)(b)(i)(A), except that these substances may not include the isoquinoline alkaloids of opium;

(C) Opium poppy and poppy straw;

(D) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation which is chemically equivalent or identical with any of these substances, and includes cocaine, its isomers and salts of isomers, whether derived from the coca plant or synthetically produced, except the substances may not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine; and

(E) Concentrate of poppy straw, which means the crude extract of poppy straw in either liquid, solid, or powder form which contains the phenanthrine alkaloids of the opium poppy.

(ii) Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, when the existence of the isomers, esters, ethers, and salts is possible within the specific chemical designation, except dextrorphan:

(A) Alphaprodine;
(B) Alfentanil;
(C) Anileridine;
(D) Bezitramide;
(E) Bulk dextropropoxyphene (nondosage forms);
(F) Carfentanil;
(G) Dihydrocodeine;
(H) Diphenoxylate;
(I) Fentanyl;
(J) Isomethadone;
(K) Levomethorphan;
(L) Levorphanol;

(M) Metazocine;
(N) Methadone;
(O) Methadone-Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
(P) Methyl-Fentanyl;
(Q) Moramide-Intermediate, 2-methyl-3-morpholino-1, 1-diphenylpropane-carboxylic acid;
(R) Pethidine (meperidine);
(S) Pethidine-Intermediate-A, 4-cyano-1-methyl-4-phenylpiperidine;
(T) Pethidine-Intermediate-B, ethyl-4-phenylpiperidine-4-carboxylate;
(U) Pethidine-Intermediate-C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;
(V) Phenazocine;
(W) Piminodine;
(X) Racemethorphan;
(Y) Racemorphan; and
(Z) Sufentanil.

(iii) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(A) Amphetamine, its salts, optical isomers, and salts of its optical isomers;
(B) Methamphetamine, its salts, isomers, and salts of its isomers;
(C) Phenmetrazine and its salts; and
(D) Methylphenidate.

(iv) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(A) Amobarbital;
(B) N,N,Dimethylamphetamine;
(C) Glutethimide;
(D) Pentobarbital;
(E) Phencyclidine;
(F) Phencyclidine immediate precursors: 1-phenyl-cyclohexylamine and 1-piperidinocyclohexanecarbonitrile (PCC); and
(G) Secobarbital.

(v) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(A) immediate precursor to amphetamine and methamphetamine;
(I) Phenylacetone.

Some of these substances may be known by trade or other names: phenyl-2-propanone, P2P; benzyl methyl ketone, methyl benzyl ketone.

soft gelatin capsule in a Fulnal Food and Drug Administration approved drug product; and

(B) Nabinol.

(c) Schedule III:

(i) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers whether optical, position, or geometric, and salts of the isomers when the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation:

(A) Those compounds, mixtures, or preparations in dosage unit form containing any stimulant substances listed in Schedule II, which compounds, mixtures, or preparations were listed on August 25, 1971, as excepted compounds under Section 308.32 of Title 21 of the Code of Federal Regulations, and any other drug of the quantitive composition shown in that list for those drugs or which is the same except that it contains a lesser quantity of controlled substances;

(B) Benzphetamine;

(C) Chlorphentermine;

(D) Clortermine;

(E) Mazindol; and

(F) Phendimetrazine.

(ii) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system:

(A) Any compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any salt of any of them, and one or more other active medicinal ingredients which are not listed in any schedule;

(B) Any suppository dosage form containing amobarbital, secobarbital, or pentobarbital, or any salt of any of these drugs which is approved by the Food and Drug Administration for marketing only as a suppository;

(C) Any substance which contains any quantity of a derivative of barbituric acid or any salt of any of them;

(D) Chorhexadol;

(E) Lysergic acid;

(F) Lysergic acid amide;

(G) Methyprylon;

(H) Sulfondiethylmethane;

(I) Sulfonethylmethane;

(J) Sulfonmethane; and

(K) Tiletamine and zolazepam or any of their salts.

(iii) Nalorphine.

(iv) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts of any of them:

veterinarian may lawfully possess it only in the container in which it was delivered to him by the person selling or dispensing it.

History: L. 1971, ch. 145, § 7; 1986, ch. 23, § 5.

Meaning of "this act." — The term "this act," in Subsection (1), means Laws 1971, ch. 145, §§ 1 to 22, which enacted this chapter.

Federal Law. — Section 305 of the Federal Comprehensive Drug Abuse Prevention and Control Act of 1970, referred to in Subsection (1), is 21 U.S.C. § 825.

58-37-8. Prohibited acts — Penalties.

(1) Prohibited acts A — Penalties:

(a) Except as authorized by this chapter, it is unlawful for any person to knowingly and intentionally:

(i) produce, manufacture, or dispense, or to possess with intent to produce, manufacture, or dispense, a controlled or counterfeit substance;

(ii) distribute a controlled or counterfeit substance, or to agree, consent, offer, or arrange to distribute a controlled or counterfeit substance;

(iii) possess a controlled substance in the course of his business as a sales representative of a manufacturer or distributor of substances listed in Schedules II through V except that he may possess such controlled substances when they are prescribed to him by a licensed practitioner; or

(iv) possess a controlled or counterfeit substance with intent to distribute.

(b) Any person convicted of violating Subsection (1)(a) with respect to:

(i) a substance classified in Schedule I or II is guilty of a second degree felony and upon a second or subsequent conviction of Subsection (1)(a) is guilty of a first degree felony;

(ii) a substance classified in Schedule III or IV, or marijuana, is guilty of a third degree felony, and upon a second or subsequent conviction punishable under this subsection is guilty of a second degree felony; or

(iii) a substance classified in Schedule V is guilty of a class A misdemeanor and upon a second or subsequent conviction punishable under this subsection is guilty of a third degree felony.

(2) Prohibited acts B — Penalties:

(a) It is unlawful:

(i) for any person knowingly and intentionally to possess or use a controlled substance, unless it was obtained under a valid prescription or order, directly from a practitioner while acting in the course of his professional practice, or as otherwise authorized by this subsection;

(ii) for any owner, tenant, licensee, or person in control of any building, room, tenement, vehicle, boat, aircraft, or other place knowingly and intentionally to permit them to be occupied by persons unlawfully possessing, using, or distributing controlled substances in any of those locations;

(iii) for any person knowingly and intentionally to be present where controlled substances are being used or possessed in violation of this

chapter and the use or possession is open, obvious, apparent, and not concealed from those present; however, a person may not be convicted under this subsection if the evidence shows that he did not use the substance himself or advise, encourage, or assist anyone else to do so; any incidence of prior unlawful use of controlled substances by the defendant may be admitted to rebut this defense;

(iv) for any person knowingly and intentionally to possess an altered or forged prescription or written order for a controlled substance;

(v) for a practitioner licensed under this chapter knowingly and intentionally to prescribe, administer, or dispense a controlled substance to a juvenile, without first obtaining the consent required in Section 78-14-5 of a parent, guardian, or person standing in loco parentis of the juvenile except in cases of an emergency; for purposes of this subsection, a juvenile means a "child" as defined in Section 78-3a-2, and "emergency" means any physical condition requiring the administration of a controlled substance for immediate relief of pain or suffering;

(vi) for a practitioner licensed under this chapter knowingly and intentionally to prescribe or administer dosages of a controlled substance in excess of medically recognized quantities necessary to treat the ailment, malady, or condition of the ultimate user; or

(vii) for any person to prescribe, administer, or dispense any controlled substance to another person knowing that the other person is using a false name, address, or other personal information for the purpose of securing the same.

(b) Any person convicted of violating Subsection (2)(a)(i) with respect to:

(i) marijuana, if the amount is 100 pounds or more, is guilty of a second degree felony;

(ii) a substance classified in Schedule I or II, or marijuana, if the amount is more than 16 ounces, but less than 100 pounds, is guilty of a third degree felony; or

(iii) marijuana, if the marijuana is not in the form of an extracted resin from any part of the plant, and the amount is more than one ounce but less than 16 ounces, is guilty of a class A misdemeanor.

(c) Any person convicted of violating Subsection (2)(a)(i) while inside the exterior boundaries of property occupied by any correctional facility as defined in Section 64-13-1 or any public jail or other place of confinement shall be sentenced to a penalty one degree greater than provided in Subsection (2)(b).

(d) Upon a second or subsequent conviction of possession of any controlled substance by a person previously convicted under Subsection (2)(b), that person shall be sentenced to a one degree greater penalty than provided in this subsection.

(e) Any person who violates Subsection (2)(a)(i) with respect to all other controlled substances not included in Subsection (2)(b)(i), (ii), or (iii), including less than one ounce of marijuana, is guilty of a class B misdemeanor. Upon a second conviction for possession of a controlled substance as provided in this subsection, the person is guilty of a class A misdemeanor, and upon a third or subsequent conviction he is guilty of a third degree felony.

(f) Any person convicted of violating Subsections (2)(a)(ii) through (2)(a)(vii) is:

(i) on a first conviction, guilty of a class B misdemeanor;

(ii) on a second conviction, guilty of a class A misdemeanor; and

(iii) on a third or subsequent conviction, guilty of a third degree felony.

(3) Prohibited acts C — Penalties:

(a) It is unlawful for any person:

(i) who is subject to this chapter to distribute or dispense a controlled substance in violation of this chapter;

(ii) who is a licensee to manufacture, distribute, or dispense a controlled substance to another licensee or other authorized person not authorized by his license;

(iii) to omit, remove, alter, or obliterate a symbol required by this chapter or by a rule issued under this chapter;

(iv) to refuse or fail to make, keep, or furnish any record, notification, order form, statement, invoice, or information required under this chapter; or

(v) to refuse entry into any premises for inspection as authorized by this chapter.

(b) Any person convicted of violating Subsection (3)(a) shall be punished by a civil penalty of not more than $5,000. The proceedings are independent of, and not in lieu of, criminal proceedings under this chapter or any other law of this state. If the violation is prosecuted by information or indictment which alleges the violation was committed knowingly or intentionally, that person is upon conviction guilty of a third degree felony.

(4) Prohibited acts D — Penalties:

(a) It is unlawful for any person knowingly and intentionally:

(i) to use in the course of the manufacture or distribution of a controlled substance a license number which is fictitious, revoked, suspended, or issued to another person or, for the purpose of obtaining a controlled substance, to assume the title of, or represent himself to be, a manufacturer, wholesaler, apothecary, physician, dentist, veterinarian, or other authorized person;

(ii) to acquire or obtain possession of, to procure or attempt to procure the administration of, to obtain a prescription for, to prescribe or dispense to any person known to be attempting to acquire or obtain possession of, or to procure the administration of any controlled substance by misrepresentation or failure by the person to disclose his receiving any controlled substance from another source, fraud, forgery, deception, subterfuge, alteration of a prescription or written order for a controlled substance, or the use of a false name or address;

(iii) to make any false or forged prescription or written order for a controlled substance, or to utter the same, or to alter any prescription or written order issued or written under the terms of this chapter;

(iv) to furnish false or fraudulent material information in any application, report, or other document required to be kept by this chapter or to willfully make any false statement in any prescription, order, report, or record required by this chapter; or

(v) to make, distribute, or possess any punch, die, plate, stone, or other thing designed to print, imprint, or reproduce the trademark,

trade name, or other identifying mark, imprint, or device of another or any likeness of any of the foregoing upon any drug or container or labeling so as to render any drug a counterfeit controlled substance.

(b) Any person convicted of violating Subsection (4)(a) is guilty of a third degree felony.

(5) Prohibited acts E — Penalties:

(a) Notwithstanding other provisions of this section, a person not authorized under this chapter who commits any act declared to be unlawful under this section, Title 58, Chapter 37a, Utah Drug Paraphernalia Act, or under Title 58, Chapter 37b, Imitation Controlled Substances Act, is upon conviction subject to the penalties and classifications under Subsection (5)(b) if the act is committed:

(i) in a public or private elementary or secondary school or on the grounds of any of those schools;

(ii) in a public or private vocational school or post-secondary institution or on the grounds of any of those schools or institutions;

(iii) in those portions of any building, park, stadium, or other structure or grounds which are, at the time of the act, being used for an activity sponsored by or through a school or institution under Subsections (5)(a)(i) and (ii);

(iv) in or on the grounds of a preschool or child-care facility;

(v) in a public park, amusement park, arcade, or recreation center;

(vi) in a church or synagogue;

(vii) in a shopping mall, sports facility, stadium, arena, theater, movie house, playhouse, or parking lot or structure adjacent thereto;

(viii) in a public parking lot or structure;

(ix) within 1,000 feet of any structure, facility, or grounds included in Subsections (5)(a)(i) through (viii); or

(x) with a person younger than 18 years of age, regardless of where the act occurs.

(b) A person convicted under this subsection is guilty of a first degree felony and shall be imprisoned for a term of not less than five years if the penalty that would otherwise have been established but for this subsection would have been a first degree felony. Imposition or execution of the sentence may not be suspended, and the person is not eligible for parole until the minimum term of imprisonment under this subsection has been served.

(c) If the classification that would otherwise have been established would have been less than a first degree felony but for this subsection, a person convicted under this subsection is guilty of one degree more than the maximum penalty prescribed for that offense.

(d) It is not a defense to a prosecution under this subsection that the actor mistakenly believed the individual to be 18 years of age or older at the time of the offense or was unaware of the individual's true age; nor that the actor mistakenly believed that the location where the act occurred was not as described in Subsection (5)(a) or was unaware that the location where the act occurred was as described in Subsection (5)(a).

(6) Any violation of this chapter for which no penalty is specified is a class B misdemeanor.

(7) Any person who attempts or conspires to commit any offense unlawful under this chapter is upon conviction guilty of one degree less than the maximum penalty prescribed for that offense.

(8) (a) Any penalty imposed for violation of this section is in addition to, and not in lieu of, any civil or administrative penalty or sanction authorized by law.

(b) Where violation of this chapter violates a federal law or the law of another state, conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

(9) (a) When it appears to the court at the time of sentencing any person convicted under this chapter that the person has previously been convicted of an offense under the laws of this state, the United States, or another state, which if committed in this state would be an offense within this chapter and it appears that probation would not be of benefit to the defendant or that probation would be contrary to the interest, welfare, or protection of society, the court, notwithstanding Section 77-18-1, may if there is compliance with Subsection (9)(b), impose a minimum term to be served by the defendant, of up to ½ the maximum sentence imposed by law for the offense committed.

(b) (i) Before any person may be sentenced to a minimum term as provided in Subsection (9)(a), the prosecuting attorney, or grand jury if an indictment, shall cause to be subscribed upon the complaint, in misdemeanor cases, or the information or indictment, in addition to the substantive offense charged, a statement setting forth the alleged past conviction of the defendant and specifically stating the date and place of conviction and the offense of which the defendant was convicted. The allegation shall be presented to the defendant at the time of his arraignment, or afterwards by leave of court, but in no event later than two days prior to the trial of the offense charged or the defendant's entering a plea of guilty. At the time of arraignment or a later date when granted by the court, the court shall read the allegation of the previous conviction to the defendant, provide him or his counsel with a copy of it, and explain to the defendant the consequences of the allegation under Subsection (9)(a). The allegation of the past conviction of the defendant is not admissible in a jury trial, except where the admissibility in evidence of a previous conviction is otherwise recognized as admissible by law.

(ii) The court, following conviction of the defendant of the substantive offense charged and prior to imposing sentence, shall inform the defendant of its decision to impose a minimum sentence under Subsection (9)(a) and inquire as to whether the defendant admits or denies the previous conviction. If the defendant denies the previous conviction, the court shall afford him an opportunity to present evidence showing that the allegation of the past conviction is erroneous or the conviction was lawfully vacated or the defendant was pardoned. The evidence shall be made a matter of record. Following the evidence, the court shall make a finding as to whether the defendant has a previous conviction, which finding is final, except for a showing of abuse of discretion. Following the findings by the court, the defendant shall be sentenced under Subsection (9)(a) or under the appropriate penalty provided by law, as the court in its discretion determines.

(c) Any person sentenced on a second offense to probation who violates that probation is subject to Subsections (9)(a) and (9)(b).

(d) Nothing in this section in any way limits or restricts Sections 76-8-1001 and 76-8-1002.

(10) In any prosecution for a violation of this chapter, evidence or proof which shows a person or persons produced, manufactured, possessed, distributed, or dispensed a controlled substance or substances, is prima facie evidence that the person or persons did so with knowledge of the character of the substance or substances.

(11) This section does not prohibit a veterinarian, in good faith and in the course of his professional practice only and not for humans, from prescribing, dispensing, or administering controlled substances or from causing the substances to be administered by an assistant or orderly under his direction and supervision.

(12) Civil or criminal liability may not be imposed under this section on:

(a) any person registered under the Controlled Substances Act who manufactures, distributes, or possesses an imitation controlled substance for use as a placebo or investigational new drug by a registered practitioner in the ordinary course of professional practice or research; or

(b) any law enforcement officer acting in the course and legitimate scope of his employment.

(13) If any provision of this chapter, or the application of any provision to any person or circumstances, is held invalid, the remainder of this chapter shall be given effect without the invalid provision or application.

History: L. 1971, ch. 145, § 8; 1972, ch. 22, § 1; 1977, ch. 29, § 6; 1979, ch. 12, § 5; 1985, ch. 146, § 1; 1986, ch. 196, § 1; 1987, ch. 92, § 100; 1987, ch. 190, § 3; 1988, ch. 95, § 1; 1989, ch. 50, § 2; 1989, ch. 56, § 1; 1989, ch. 178, § 1; 1989, ch. 187, § 2; 1989, ch. 201, § 1; 1990, ch. 161, § 1; 1990, ch. 163, § 2; 1990, ch. 163, § 3; 1991, ch. 80, § 1; 1991, ch. 198, § 4; 1991, ch. 268, § 7.

Amendment Notes. — The 1990 amendment by ch. 161, effective April 23, 1990, inserted "to obtain a prescription for" and "or failure by the person to disclose his receiving any controlled substance from another source" in Subsection (4)(a)(ii) and corrected two reference errors in Subsection (13).

The 1990 amendment by ch. 163, § 2, effective from April 23, 1990 until July 1, 1990, corrected reference errors in Subsections (9)(a) and (13)(b).

The 1990 amendment by ch. 163, § 3, effective July 1, 1990, substituted "Section 77-18-1" for "Rule 20, Utah Rules of Criminal Procedure" in Subsection (9)(a).

The 1991 amendment by ch. 80, effective April 29, 1991, in Subsection (5)(a), inserted Subsection (ii), redesignated former Subsection (ii) as (iii), substituted "or institution under Subsections (5)(a)(i) and (ii)" for "under Subsection (5)(a)(i)" in Subsection (iii), inserted Subsections (iv) through (viii), redesignated former Subsections (iii) and (iv) as (ix) and (x), and substituted "Subsections (5)(a)(i) through (vii)" for "Subsection (5)(a)(i) or (ii)" in Subsection (ix); substituted "Chapter 37a, Title 58, Utah Drug Paraphernalia Act or Chapter 37b, Title 58, Imitation Controlled Substances Act" for "Chapters 37a or 37b, Title 58" in Subsection (13)(a); and added Subsection (14) (appearing as Subsection (13) after January 1, 1992).

The 1991 amendment by ch. 198, effective April 29, 1991, substituted all of the present language after "Schedules II through V" in Subsection (1)(a)(iii) for "under an order or prescription," and made stylistic changes in the introductory paragraph of Subsection (5)(a).

The 1991 amendment by ch. 268, effective January 1, 1992, deleted former Subsection (13), imposing a fee of $150 against each person convicted of, and each juvenile found within the court's jurisdiction because of, committing an offense and providing for the use of funds generated by the fee.

This section is set out as reconciled by the Office of Legislative Research and General Counsel.

Cross-References. — Cities and towns, prohibitions of sales of narcotics to minors, § 10-8-47.

Psychotoxic chemical solvents, penalties for use or sale, § 76-10-101 et seq.

Sentencing for felonies, §§ 76-3-201, 76-3-203, 76-3-301.

Sentencing for misdemeanors, §§ 76-3-201, 76-3-204, 76-3-301.

ADDENDUM B

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

THE STATE OF UTAH,	)
	) FINDINGS OF FACT, CONCLUSIONS
Plaintiff,	) OF LAW AND ORDER DENYING
v.	) MOTION TO SUPPRESS EVIDENCE
	)
GORDON RAY HAM,	) Case No. 941901494FS
	)
Defendant.	) Honorable DAVID S. YOUNG

The defendant's Motion to Suppress Evidence having come before this Court for a hearing on November 17, 1994, and the Court having considered the pleadings and other documents filed with the Court, having considered the testimony of officers McCullough and Hillam and the defendant, having considered the arguments of counsel, and otherwise being fully advised regarding the matter before it the Court now enters its FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER:

FINDINGS OF FACT

1. The defendant, Gordon Ray Ham, is presently and was on October 13, 1994, on probation based on his conviction for a felony related to sexual conduct. Pursuant to being placed on probation the defendant executed a probation agreement whereby he agreed, inter alia, to not use or possess

alcohol or any controlled substance, to allow probation officers to visit his residence to ensure his compliance with his conditions of probation, and to allow probation officers to search his residence or property under his control if the officers reasonably suspect a violation of probation.

2. On October 13, 1994, agents Scott McCullough and Craig Hillam of Adult Probation and Parole went to the defendant's residence at 8625 South 150 West in Midvale, Utah, to conduct a routine "home visit."

3. At the onset of this home visit, Agent McCullough informed the defendant that he wished to ensure the defendant's compliance with his "no alcohol" probation condition and stated words to the effect "We need to look in the refrigerator for alcohol" to which the defendant replied words to the effect "Go ahead" (in any event the defendant did not state any objection). Agent McCullough did not find alcohol in the refrigerator, but Agent Hillam, who looked into an adjacent freezer, did locate two bottles of alcohol. This alcohol was seized, but then disposed of in the kitchen drain.

4. After the initial discovery of contraband alcohol, the defendant was instructed by Agent McCullough to escort the officers in a cursory "walk through" of the residence to look for other evidence of the defendant's alcohol use. When the agents were led into the basement--where the defendant had been before meeting the agents at the front door--a cooler was found in the center of the room filled with ice and 14 cans of beer. As Agent McCullough secured the cooler, Agent Hillam looked into an adjacent room, and after illuminating the room by turning a bulb in its socket, he saw a mirror in plain view which had a white powdery substance on it along with drug paraphernalia including razor blades and a straw. Based on his training and experience Agent Hillam believed the substance was cocaine and therefore arrested the defendant.

5. After the defendant was placed in custody and restrained with handcuffs, but before he was provided his Miranda warning, the defendant was subjected to brief interrogation. In response to

questioning he admitted that the substance was cocaine and belonged to him, and he also told Agent Hillam that "mushrooms" would be found in a jar on a shelf in the room where the cocaine was discovered.

6. During a delay while the agents awaited backup, the defendant and a guest were secured for officers' safety and efforts to search the residence were suspended. Before any other officers arrived, the defendant was provided his Miranda warning and he agreed to speak without the presence of an attorney. During subsequent interrogation he restated that the cocaine found on the mirror was his, and he directed Agent McCullough to discover more cocaine located in locked chest that was bolted to the floor under the stairway.

7. In the absence of admissions by the defendant, the probation officers would have thoroughly searched the residence for additional contraband after finding the defendant in violation of his probation by possessing the cocaine found in plain view during the "walk through."

CONCLUSIONS OF LAW

1. The search of the freezer which revealed the two bottles of liquor was a lawful reasonable search because the defendant agreed in the probation agreement he signed to allow probation officers to search his residence for evidence of violations of probation, and because the defendant consented to a search of his refrigerator, and by implication, his freezer.

2. Once the liquor was discovered, the probation officers had a "reasonable suspicion" to conduct a more intrusive search of the house pursuant to State v. Valesquez, 672 P.2d 1254 (Utah 1983).

3. The additional discovery of the beer in the cooler in the downstairs of the house further supported a "reasonable suspicion" justifying the scope of the search which led to the discovery of the defendant's possession of cocaine.

4. After his arrest, the defendant was subjected to custodial interrogation in violation of Miranda, but the evidence that was found subsequent to the defendant's arrest is not subject to suppression because its discovery was inevitable in that the probation officers would have conducted the search of the residence even had the defendant not made any statements. See Nix v. Williams, 467 U.S. 431, 104 S.Ct. 2501 (1984).

ORDER

Having entered its Findings of Fact and Conclusions of Law, NOW, it is HEREBY ORDERED ADJUDGED and DECREED that the defendant's Motion to Suppress Evidence is DENIED.

DATED this 6th day of ~~December~~ February, 1995

BY THE COURT:

DAVID S. YOUNG, Judge

Approved as to form:

SOLOMON CHACON
Counsel for Defendant

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing Findings of Fact, Conclusions of Law and Order Denying the defendant's Motion to Suppress Evidence was delivered to Solomon Chacon, counsel for defendant, by mailing it to 124 South 400 East, Suite 320, Salt Lake City, Utah 84111 this 8th day of December, 1994.